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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

NANCY CAMPOS, an individual, on
behalf of herself and all others similarly
situated,

Plaintiff,

v.

WESTERN DENTAL SERVICES, INC.
and JENNIFER ROTH,

Defendants.

Case No. 05-02119 RMW

**PLAINTIFF'S MEMORANDUM
IN SUPPORT OF PLAINTIFF'S
MOTION FOR CLASS
CERTIFICATION**

HON. RONALD M. WHYTE
Date: September 2, 2005
Time: 9:00 a.m.

U.S. DISTRICT COURT
280 South 1st St., San Jose, CA

**PLAINTIFF'S MEMORANDUM IN SUPPORT OF
PLAINTIFF'S MOTION FOR CLASS CERTIFICATION**

I. NATURE OF THE CASE

Plaintiff Nancy Campos brings this case as a class action against Defendants
Western Dental Services, Inc. and Jennifer Roth (hereinafter "Defendants") for violations of the
Fair Debt Collection Practices Act, 15 U.S.C. §§1692 *et seq.*, (hereinafter "FDCPA"), and
California Fair Debt Collection Practices Act Cal. Stat. § 1788 *et seq.* (hereinafter "CA

1 FDCPA”), which prohibit debt collectors from using false or misleading communications in an
 2 attempt to collect a debt.¹

3 The Plaintiff requests that the Court certify a class in this action defined as: (i) all
 4 persons who were sent at an address in the State of California (ii) a letter in the form of Exhibit
 5 B (iii) by Defendants in an attempt to collect a debt incurred for personal, family, or household
 6 purposes (iv) which was not returned undelivered by the U.S. Post Office and (v) sent during the
 7 one year period prior to the filing of the complaint in this action.

8 This Memorandum is submitted in support of Plaintiff's Motion for Class
 9 Certification.

10 **II. PLAINTIFF'S CLAIMS**

11 In her Class Action Complaint, Nancy Campos alleges that Defendants' policy
 12 and practice is or was to violate the FDCPA by: (i) using a name other than its own in collecting
 13 or attempting to collect a debt in violation of 15 U.S.C. §§ 1692e and e(10); (ii) falsely
 14 representing that some independent outside attorney was handling the account in violation of 15
 15 U.S.C. §§ 1692e and e(10); (iii) designing, compiling or furnishing deceptive forms used to
 16 create a belief that a third person is involved in collecting a debt in violation of 15 U.S.C. §
 17 1692j; (iv) failing to provide consumers required notices in violation of 15 U.S.C. §§ 1692g and
 18 e(11); and (v) falsely threatening immediate action not intended within the time frame threatened
 19 in violation of 15 U.S.C. §§ 1692e, e(5), and e(10). Ms. Campos also alleges that Defendants
 20 violated the California Fair Debt Collection Practices Act, Civil Code 1788 et seq. (CA FDCPA)
 21 by (i) failing to provide notices required by Civil Code 1812.700; (ii) failing to comply with 15
 22 U.S.C. § 1692b - j; and (iii) falsely representing that the account was about to be referred to a
 23 collection agency.

24 **III. STANDARD FOR CLASS CERTIFICATION**

25
 26 ¹Plaintiff seeks certification under both 15 U.S.C. 1692k and Civil Code 1788.17. See
 27 Abels v. JBC Legal Group, P.C., 227 F.R.D. 541, 544 (N.D.Cal. 2005)(certifying a class under
 the CA FDCPA).

1 In order for a class to be certified all four requirements of Rule 23(a) must be
 2 satisfied along with one of the three categories of Rule 23(b). *Amchem Products, Inc. v.*
 3 *Windsor*, 521 U.S. 591, 117 S.Ct. 2231, 2245, 138 L.Ed.2d 689 (1997); *Zinser v. Accufix*
 4 *Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001); *Keele v. Wexler*, 149 F.3d 589, 594
 5 (7th Cir. 1998). "When evaluating a motion for class certification, the court accepts the
 6 allegations made in support of certification as true, and does not examine the merits of the case."
 7 *Blackie v. Barrack*, 524 F.2d 891, 901 n16 (9th Cir. 1975).

8 Congress expressly recognized the propriety of a class action under the FDCPA
 9 by providing special damage provisions and criteria in 15 U.S.C. §§1692k(a) and (b) for FDCPA
 10 class action cases. See: *Abels v. JBC Legal Group, P.C.*, 227 F.R.D. 541, 544 (N.D.Cal. 2005);
 11 *Clark v. Bonded Adjustment Co.*, 204 F.R.D. 662 (E.D.Wash. 2002); *Irwin v. Mascott*, 186
 12 F.R.D. 567 (N.D.Cal. 1999); *Ballard v. Equifax Check Services, Inc.*, 186 F.R.D. 589 (E.D.Cal.
 13 1999); *Duran v. Bureau of Yuma, Inc.*, 93 F.R.D. 607 (D.Ariz. 1982).

14 **IV. THE PROPOSED CLASS MEETS THE** 15 **REQUIREMENTS FOR CERTIFICATION.**

16 **1. RULE 23(a)(1) – NUMEROSITY**

17 Rule 23(a)(1) of the Federal Rules of Civil Procedure requires that the class be
 18 "so numerous that joinder of all members is impracticable." *Gay v. Waiters and Dairy*
 19 *Lunchmen's Union*, 549 F.2d. 1330 (9th Cir. 1977). However, "impracticability does not mean
 20 impossibility." *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 913 (9th Cir. 1964);
 21 see also *Rabidoux v. Celani*, 987 F.2d 931, 935 (2d Cir. 1993). "When the class is large,
 numbers alone are dispositive" *Riordan v. Smith Barney*, 113 F.R.D. 60, 62 (N.D.Ill. 1986).

22 Here, the class is so numerous that joinder of all members is impractical. The
 23 class definition includes those persons who received letters of the same form (Exhibit A,
 24 attached to the Complaint) from Defendants. On information and belief, the number of form
 25 letters sent by Defendants to members of the class is in the hundreds or thousands. The exact
 26 number will be revealed in Defendants' Answers to Plaintiff's Discovery Requests. "Class
 27
 28

1 actions are generally appropriate where standardized documents are at issue.” *Abels, supra* at
2 543.

3 Thus, Ms. Campos has satisfied the numerosity requirement of Rule 23(a)(1).

4 **2. RULE 23(a)(2) -- COMMONALITY**

5 Rule 23(a)(2) requires that there be a common question of law or fact. A common
6 nucleus of operative fact is usually enough to satisfy the commonality requirement of Rule
7 23(a)(2). *Hanlon v. Chrysler Corp.*, 150 F. 3d 1011, 1019 (9th Cir. 1998). Where the defendant
8 has engaged in standardized conduct towards members of the proposed class by mailing to them
9 allegedly illegal form letters or documents the commonality requirement is met. “Common
10 nuclei of fact are typically manifest where, like in the case sub judice, the defendants have
11 engaged in standardized conduct towards members of the proposed class by mailing to them
12 allegedly illegal form letters or documents”. *Keele v. Wexler*, 149 F. 3d 589, 594 (7th Cir. 1998)
(citations omitted); *Abels, supra* at 544.

13 Not all factual or legal questions raised in the litigation need be common so long
14 as at least one issue is common to all class members. *Hanlon v. Chrysler Corp., supra* at 1019;
15 *Baby Neal for and by Kanter v. Casey*, 43 F.3d 48, 56-57 (3d Cir. 1994). “A sufficient nexus is
16 established if the claims or defenses of the class and the class representatives arise from the same
17 event or pattern or practice and are based on the same legal theory.” *Armstrong v. Davis*, 275 F.
18 3d 849, 868 (9th Cir. 2001).

19 There are common questions of law and fact common to the class, which
20 questions predominate over any questions affecting only individual class members. All class
21 members received Exhibit B (attached to the Complaint). As explained in Section II herein, the
principal issues are whether Defendants’ collection letters violated the FDCPA by:

- 22 (i) using a name other than its own in collecting or attempting to collect a debt in
23 violation of 15 U.S.C. §§ 1692e and e(10);
- 24 (ii) falsely representing that some independent outside attorney was handling the
25 account in violation of 15 U.S.C. §§ 1692e and e(10);
- 26 (iii) designing, compiling or furnishing deceptive forms used to create a belief that a
27 third person is involved in collecting a debt in violation of 15 U.S.C. § 1692j;

- 1 (iv) failing to provide consumers required notices in violation of 15 U.S.C. §§ 1692g
 2 and e(11); and
- 3 (v) falsely threatening immediate action not intended within the time frame
 4 threatened in violation of 15 U.S.C. § 1692e, e(5) and e(10);
 5 and whether Defendants' collection letters violated the CA FDCPA by
- 6 (i) failing to provide notices required by Civil Code 1812.700;
 7 (ii) failing to comply with 15 U.S.C. § 1692b - j; and
 8 (iii) falsely representing that the account was about to be referred to a collection
 9 agency.

10 "To establish commonality, it is sufficient that plaintiff allege that all class
 11 members received the same collection letter." *Swanson v. Mid Am, Inc.*, 186 F.R.D. 665, 668
 12 (M.D. Fla. 1999). "The plaintiff's and the class' claims arise from the defendant having sent the
 13 same debt collection letters resulting in the same alleged violations of the act. . . Therefore, the
 14 proposed class members share common questions of law and fact . . ." *Silva v. National Telewire*
 15 *Corp.*, *supra* at *7-8. FDCPA claims based on standard language in documents or standard
 16 practices are well suited for class certification. *Keele v. Wexler*, *supra*.

17 It is also important to note that there is no question in this case concerning the
 18 validity of the underlying debt. *Baker v. G.C. Services Corp.*, 677 F.2d 775, 777 (9th Cir. 1982)
 19 (FDCPA action was not contingent on the validity of the underlying debt); *McCarthy v. First*
 20 *City Bank*, 970 F.2d 45 (5th Cir. 1992) (same).

21 Thus, Ms. Campos has satisfied the commonality requirement of Rule 23(a)(2).

22 **3. RULE 23(a)(3) -- TYPICALITY**

23 Rule 23(a)(3) requires that the claims of the named plaintiff be typical of the
 24 claims of the class. *Hanlon v. Chrysler Corp.*, 150 F.3d. 1011 (9th Cir. 1998).

25 A plaintiff's claim is typical if it arises from the same event or practice or course
 26 of conduct that gives rise to the claims of other class members and his or her
 27 claims are based on the same legal theory. The typicality requirement may be
 28 satisfied even if there are factual distinctions between the claims of the named
 plaintiffs and those of other class members. Thus, similarity of legal theory may
 control even in the face of differences of fact.

1 *Armstrong v. Davis*, *supra* at 869; *See also, Appleyard v. Wallace*, 754 F.2d 955, 958 (11th Cir.
 2 1985); *Rossini v. Ogilvy & Mather, Inc.*, 798 F.2d 590, 598-600 (2d Cir. 1986); *Kornburg*, 741
 3 F.2d at 1337. *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992); *Keele v. Wexler*, *supra*
 4 at 595.

5 In *Abels*, *supra*, the Northern District of California stated, “Each of the class
 6 members was sent the same collection letter as [plaintiff] and each was allegedly subjected to the
 7 same violations of the FDCPA. Therefore, this Court concludes that claims of the class
 8 representative are [sic] typical of the claims of the class.” *Abels*, *supra* at 545.

9 In the instant case, each of the class members were sent letters in the form of
 10 Exhibit B (attached to the Complaint), which Plaintiff claims violate the FDCPA. Here,
 11 typicality is inherent in the class definition, *i.e.*, each of the class members were subject to the
 12 same demands and violations of the FDCPA as Ms. Campos.

13 Thus, the typicality requirement of Rule 23(a)(3) is satisfied.

14 **4. RULE 23(a)(4) -- ADEQUACY OF REPRESENTATION**

15 The rule also requires that the named plaintiffs provide fair and adequate
 16 protection for the interests of the class. *Epstein v. MCA, Inc.*, 179 F.3d. 641 (9th Cir. 1999).
 17 That protection involves two factors: (1) whether plaintiff’s counsel are qualified, experienced,
 18 and generally able to conduct the proposed litigation, and (2) whether the plaintiffs have interests
 19 antagonistic to those of the class. *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F. 2d 507, 512
 20 (9th Cir 1978); *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 291 (2d Cir. 1992).

21 Nancy Campos understands her responsibilities as class representative. See
 22 Declaration of Nancy Campos in Support of Plaintiff’s Motion for Class Certification, filed
 23 separately. She is represented by experienced counsel whose qualifications are set forth in
 24 Declaration of Ronald Wilcox and Declaration of O. Randolph Bragg, filed separately. The
 25 Northern District of California has stated, “it seems clear that the lead counsel for this lawsuit,
 26 O. Randolph Bragg, has been qualified and found competent to represent similar class actions.”
 27 *Abels*, *supra* at 545.

1 The second relevant consideration under Rule 23(a)(4) is whether the interests of
 2 the named plaintiff are coincident with the general interests of the class. Ms. Campos and the
 3 class members seek actual and statutory damages as well as equitable relief as the result of
 4 defendants' unlawful collection notices. Given the identical nature of the claims between Ms.
 5 Campos and the class members, there is no potential for conflicting interests in this action.
 6 There is no antagonism between the interests of the named plaintiff and those of the class.

7 Thus, Ms. Campos has satisfied the representativeness requirement of Rule
 8 23(a)(4).

9 10 11 **5. COMMON QUESTIONS 12 OF LAW OR FACT PREDOMINATE**

13 Rule 23(b)(3) requires that the questions of law or fact common to all members of
 14 the class predominate over questions pertaining to individual members. Hanlon v. Chrysler
 15 Corp., supra at 1019. This criterion is normally satisfied when there is an essential, common
 16 factual link between all class members and the defendant for which the law provides a remedy.
 17 Valentino v. Carter-Wallace, Inc., 97 F.3d 1227 (9th Cir. 1996); see also: Silva v. National
 18 Telewire Corp., supra at *11 ("The standardized nature of the defendant's conduct satisfied the
 19 requirement for common questions of law or fact."). In this case, the "common nucleus of
 20 operative fact," is that all class members, by definition, were subjected to defendants' policy of
 21 sending a collection letter, Exhibit B (attached to the Complaint), which is alleged to violate the
 22 FDCPA. The legal issues arising from Defendants' letters are the same for each class member.

23 Cases dealing with the legality of standardized documents and practices are
 24 generally appropriate for resolution by class action because the document is the focal point of the
 25 analysis. See Abels, supra at 543; Clark v. Bonded Adjustment Co., supra; Littledove v. JBC &
 26 Assocs., supra; Ballard v. Equifax Check Services, Inc., 186 F.R.D. 589 (E.D.Cal. 1999); Irwin
 27 v. Mascott, 186 F.R.D. 567 (N.D.Cal. 1999).

1 Because of the standardized nature of Defendants' conduct, common questions
 2 predominate. "Predominance is a test readily met in certain cases alleging consumer . . . fraud. .
 3 . . ." *Amchem Prods. v. Windsor*, supra at 624.

4 In *Abels*, supra, the court stated in support of certifying the class,

5 The common fact in this case is that the putative class members were subjected to
 6 Defendants' policy of sending collection letters, which are alleged to violate the
 7 FDCPA. Thus, the legal issues arising from Defendants' letters are the same for
 8 each class member. Here, the issues common to the class—namely, whether the
 9 Defendants' systematic policy of sending collection letters, and whether those
 10 letters violate FDCPA—are predominant. Plaintiff's Complaint centers around
 11 these issues.

12 *Abels*, supra at 547.

13 The instant case is the same as *Abels*. The only individual issue is the
 14 identification of the consumers who were subjected to Defendants' practice and policy of
 15 sending Exhibits A and/or B. This is a matter capable of ministerial determination from the
 16 Defendants' records. This is not the kind of problem that is a barrier to class certification.

17 In this case, it is clear that both the class's factual issues and the issues of law
 18 predominate over any individual questions.

19 **6. A CLASS ACTION IS SUPERIOR TO
 20 OTHER AVAILABLE METHODS TO
 21 RESOLVE THIS CONTROVERSY.**

22 Efficiency is the primary focus in determining whether the class action is the
 23 superior method for resolving the controversy presented. *Gete v. I.N.S.*, 121 F.3d 1285 (9th Cir.
 24 1997). The Court is required to determine the best available method for resolving the
 25 controversy and must "consider the interests of the individual members in controlling their own
 26 litigation, the desirability of concentrating the litigation in the particular forum, and the
 27 manageability of the class action." *Ballard v. Equifax Check Services, Inc.*, supra at 600. It is
 28 proper for a court, in deciding the "best" available method, to consider the ". . . inability of the
 poor or uninformed to enforce their rights, and the improbability that large numbers of class
 members would possess the initiative to litigate individually." *Haynes v. Logan Furniture Mart,*
Inc., 503 F.2d 1161, 1165 (7th Cir. 1974).

1 In this case there is no better method available for the adjudication of the claims
 2 which might be brought by each individual debtor subjected to defendants' practice. *Clark v.*
 3 *Bonded Adjustment Co.*, *supra* at 666. Class actions are a more efficient and consistent means of
 4 trying the legality of a collection letter. *Irwin v. Mascott*, 186 F.R.D. 567 (N.D.Cal. 1999);
 5 *Ballard v. Equifax Check Services, Inc.*, 186 F.R.D. 589 (E.D.Cal. 1999); *Brink v. First Credit*
 6 *Resources*, 185 F.R.D. 567 (D.Ariz. 1999).

7 The efficacy of consumer class actions is recognized particularly where the
 8 individual's claim is small.

9 In this instance, the alternative methods of resolution are individual claims for a
 10 small amount of consequential damages or latch replacement...Thus, many claims
 11 could not be successfully asserted individually. Even if efficacious, these claims
 12 would not only unnecessarily burden the judiciary, but would prove uneconomic
 13 for potential plaintiffs. In most cases, litigation costs would dwarf potential
 14 recovery. In this sense, the proposed class action is paradigmatic. A fair
 15 examination of alternatives can only result in the apodictic conclusion that a class
 16 action is the clearly preferred procedure in this case.

17 *Hanlon v. Chrysler Corp.*, *supra* at 1023. Moreover, "the size of any individual damages claims
 18 under the FDCPA are usually so small that there is little incentive to sue individually." *Ballard*
 19 *v. Equifax Check Services, Inc.*, *supra* at 600 (citations omitted).

20 Class certification of an FDCPA damage action will provide an efficient and
 21 appropriate resolution of the controversy. See *Irwin v. Mascott*, *supra*; *Ballard v. Equifax Check*
 22 *Services, Inc.*, *supra*.

23 Thus, certification of this action is the superior method to resolve the controversy
 24 presented here.

25 **7. CLASS CERTIFICATION PURSUANT TO** 26 **23(b)(2) IS APPROPRIATE.**

27 An action may be maintained as a class action under Rule 23(b)(2) if:

28 the party opposing the class has acted or refused to act on grounds
 generally applicable to the class, thereby making appropriate final
 injunctive relief or corresponding declaratory relief with respect to the
 class as a whole. . .

1 Various FDCPA actions have been certified pursuant to Rule 23(b)(2). *Swanson v. Mid Am, Inc.*,
2 186 F.R.D. 665 (M.D. Fla. 1999); *Borcharding-Dittloff v. Transworld Systems, Inc.*, 185 F.R.D.
3 558, 565-66 (W.D. Wis., 1999); *Gammon v. GC Services Ltd. Partnership*, 162 F.R.D. 313,
4 319-322. (N.D.Ill. 1995).

5 In *Gammon v. GC Services Ltd. Partnership*, *supra*, 162 F.R.D. at 319-322, the
6 court certified a class in an FDCPA action for declaratory relief. Entry of a declaratory
7 judgment is favored: "(1) when the judgment will serve a useful purpose in clarifying and
8 settling the legal relations in issue, and (2) when it will terminate and afford relief from the
9 uncertainty, insecurity, and controversy giving rise to the proceeding." *Id.* at 320, quoting E.
10 Borchard, *DECLARATORY JUDGMENTS* 299 (2d ed. 1941).

11 The archetypal case for Rule 23(b)(2) certification is one where policies
12 applicable to a large number of persons are challenged as unlawful. This is true even in actions
13 where the plaintiff's claim for declaratory and injunctive relief is accompanied by damages or
14 retroactive relief claims. In *Probe v. State Teachers' Retirement System*, 780 F.2d 776, 780 (9th
15 Cir. 1986), the Ninth Circuit held that certification of a suit in which male plaintiffs sought
16 injunctive and declaratory relief concerning a retirement plan's use of sex-based mortality tables
17 in calculating the benefits due under the plan is clearly appropriate under Rule 23(b)(2), even
18 though the plaintiffs also sought individual damages and retroactive monetary relief. *See also*
19 *Arnold v. United Artists Theatre Circuit, Inc.*, 158 F.R.D. 439, 458 (N.D.Cal. 1994), where
20 plaintiffs alleged that United Artists theaters failed to make their theaters accessible to
21 handicapped individuals, in violation of federal and state civil rights laws. The district court
22 certified a class action under Rule 23(b)(2), even though plaintiffs sought individual damages for
23 class members under federal and state law.

24 The declaratory relief sought in this action would declare Defendants' use of
25 Exhibit B to be illegal in violation of the FDCPA. Defendants have acted or refused to act on
26 grounds generally applicable to the class, thereby making appropriate final injunctive relief or
27

1 corresponding declaratory relief with respect to the class as a whole. Thus, declaratory and
 2 injunctive relief are appropriate for the class as a whole.

3 **8. CLASS CERTIFICATION AS A HYBRID**
 4 **CLASS UNDER RULES 23(b)(2) AND**
 5 **23(b)(3) IS APPROPRIATE.**

6 Plaintiff requests class certification under both Rule 23(b)(2) and Rule 23(b)(3).
 7 Hybrid class actions such as this have been certified where the best interests of the class
 8 members are served. *Bracamonte v. Eskanos & Adler, et al.*, 2004 U.S. Dist. LEXIS 8520, *15
 9 (N.D.Cal., May 7, 2004) (“the [23(b)(2) and 23(b)(3)] class action will protect the rights of
 10 individual class members who are unable or unwilling to protect themselves.”); *Simon v. World*
 11 *Omni Leasing*, 146 F.R.D. 197, 202-203 (S.D.Ala. 1992) (declaratory judgment, injunctive
 12 relief, as well as actual and statutory damages are sought for the class members.) Thus, the
 13 combination of Rule 23(b)(2) for declaratory relief and Rule 23(b)(3) for monetary damages is
 14 appropriate.

15 In this action equitable relief as well as statutory damages are sought for the class
 16 members. Thus, the combination of Rule 23(b)(2) for equitable relief and Rule 23(b)(3) for
 17 monetary damages is appropriate. In *Bracamonte v. Eskanos & Adler, et al.*, *supra* at *15, the
 18 Court found that the standardized document was the focal point of the analysis; therefore,
 19 common questions predominate, and a class action would most efficiently and consistently
 20 resolve the claim concerning a standardized collection letter. *See also: Littledove v. JBC &*
 21 *Assocs.*, *supra* at *13-*17; *Ballard v. Equifax Check Services, Inc.*, *supra* at 596 and 600. This
 22 action may be maintained as a hybrid class action combining the elements of Rule 23(b)(2) and
 23 (3). *Irwin v. Mascott*, 96 F.Supp.2d 968 (N.D.Cal. 1999).

24 **V. CONCLUSION**

25 The proposed class meets the requirements of Rules 23(a) as well as Rule
 26 23(b)(3) and (b)(2). Plaintiff Nancy Campos respectfully requests that the Court certify this
 27 action as a class action.

28 Respectfully submitted,

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Dated: 7/28/05

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